

This Opinion is Not a  
Precedent of the TTAB

Mailed: December 15, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Precision Textiles LLC*

\_\_\_\_\_  
Serial No. 88443643

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Joseph Agostino and Sang Eun Lee of Greenberg Traurig, LLP for Precision  
Textiles LLC.

Erin Zaskoda Dyer, Trademark Examining Attorney, Law Office 103,  
Stacy Wahlberg, Managing Attorney.

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Before Kuhlke, Larkin, and Coggins,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Precision Textiles LLC (“Applicant”) seeks registration on the Principal Register of the standard-character mark ENDURE for goods ultimately identified as “Fabrics for textile use, namely, heat, flame and fire resistant fabrics for bedding; non-woven textile fabrics, namely, heat, flame and fire resistant non-woven textile fabrics for bedding; woven fabrics, namely, heat, flame and fire resistant woven fabrics for

bedding; knitted fabrics, namely, heat, flame and fire resistant knitted fabrics for bedding,” in International Class 24.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the mark shown below



registered on the Principal Register for “textile fibers; textile filaments” in International Class 22,<sup>2</sup> as to be likely, when used on or in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made the refusal final, Applicant requested reconsideration, which was denied, and then appealed. Applicant and the Examining Attorney have filed briefs.<sup>3</sup> We affirm the refusal to register.

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<sup>1</sup> Application Serial No. 88443643 was filed on May 23, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

<sup>2</sup> The cited Registration No. 5482250 issued on May 29, 2018.

<sup>3</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board’s public online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s brief appears at 13 TTABVUE and the Examining Attorney’s brief appears at 15 TTABVUE.

## **I. Prosecution History and Record on Appeal<sup>4</sup>**

We briefly summarize below the prosecution history of the application because it provides useful background to our disposition of the appeal.

Applicant originally sought registration of its mark for goods identified as “Fabrics for textile use; non-woven textile fabrics; woven fabrics; knitted fabrics.”<sup>5</sup> The Examining Attorney refused registration under Section 2(d) based on the cited registration and another registration, and noted a prior pending application as a possible bar to registration.<sup>6</sup> The Examining Attorney made of record USPTO electronic records regarding the cited Registration No. 5482250,<sup>7</sup> and third-party webpages and registrations that she claimed showed that the goods identified in the application and in the cited registrations are commonly sold under the same marks.<sup>8</sup> Applicant responded to the Office Action by arguing against the refusals, making of record pages from its website at [precisiontextiles-usa.com](http://precisiontextiles-usa.com).<sup>9</sup>

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<sup>4</sup> Citations in this opinion to the application record, including the request for reconsideration and its denial, are to the electronic version of pages in the Trademark Status and Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

<sup>5</sup> May 23, 2019 Application at TSDR 1.

<sup>6</sup> July 31, 2019 Office Action at TSDR 1. As discussed below, the Examining Attorney ultimately withdrew the refusal based on the second cited registration when it was cancelled, and the noted prior pending application became abandoned. We have not summarized record evidence directed specifically to the refusal based on the cancelled registration.

<sup>7</sup> *Id.* at TSDR 4-6.

<sup>8</sup> *Id.* at TSDR 9-117.

<sup>9</sup> January 30, 2020 Response to Office Action at TSDR 7-9.

The Examining Attorney then suspended further examination of the application pending the disposition of the cited prior pending application.<sup>10</sup> The Examining Attorney made of record various registrations and applications owned by Applicant that she claimed showed that it is common for companies to use formatives of various marks to identify the same or similar goods.<sup>11</sup>

When the prior pending application became abandoned, the Examining Attorney issued an Office Action making final the refusal to register based on the cited registration. She made of record additional registrations and applications owned by Applicant, and third-party registrations and webpages, which she claimed showed that it is common for companies to use formatives of various marks to identify the same or similar goods.<sup>12</sup> Applicant requested reconsideration, amending its identification of goods to “Fabrics for textile use, namely, heat, flame and fire resistant fabrics for bedding; non-woven textile fabrics, namely, heat, flame and fire resistant non-woven textile fabrics for bedding; woven fabrics, namely, heat, flame and fire resistant woven fabrics for bedding; knitted fabrics, namely, heat, flame and fire resistant knitted fabrics for bedding,”<sup>13</sup> and making of record pages from the cited registrant’s website;<sup>14</sup> USPTO electronic records regarding “pairs” of similar marks for goods in Classes 22 and 24 that Applicant claimed were similar to the goods in the

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<sup>10</sup> March 2, 2020 Suspension Notice at TSDR 1.

<sup>11</sup> *Id.* at TSDR 2-14.

<sup>12</sup> September 10, 2021 Final Office Action at TSDR 2-62.

<sup>13</sup> February 14, 2022 Request for Reconsideration at TSDR 2.

<sup>14</sup> *Id.* at TSDR 12-17.

cited registration and the goods in the application, as amended;<sup>15</sup> a dictionary definition of the word “endure;”<sup>16</sup> and third-party registrations and webpages that Applicant claimed showed use of ENDUR or similar wording for textile fibers, textile filaments, and related goods.<sup>17</sup>

The Examining Attorney denied the Request for Reconsideration, making of record pages from Applicant’s website, and the website of FURNITURETODAY, regarding Applicant’s products,<sup>18</sup> and third-party webpages that the Examining Attorney claimed showed the complementary purpose and function of fabrics and textiles.<sup>19</sup>

## **II. Analysis of Section 2(d) Refusal**

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476

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<sup>15</sup> *Id.* at TSDR 18-32.

<sup>16</sup> *Id.* at TSDR 33-40 (MERRIAM-WEBSTER DICTIONARY).

<sup>17</sup> *Id.* at TSDR 41-54.

<sup>18</sup> April 15, 2022 Denial of Request for Reconsideration at TSDR 2-10, 124-31.

<sup>19</sup> *Id.* at TSDR 11-123.

F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*20 (TTAB 2022) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). Applicant argues that the *DuPont* factors “especially applicable here” include these two key factors, as well as the third factor, the “similarity or dissimilarity of established, likely-to-continue trade channels,” *DuPont*, 177 USPQ at 567; the fourth factor, the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing,” *id.*; the sixth factor, the “number and nature of similar marks in use on similar goods,” *id.*; and what Applicant calls “other probative factors.” 13 TTABVUE 6.

**A. The Nature and Number of Similar Marks in Use on Similar Goods**

We consider the sixth *DuPont* factor at the outset because it may affect our analysis of the scope of protection to which the cited mark may be entitled.

“The Federal Circuit has held that evidence of the extensive registration and use of a term by others can be powerful evidence of the term’s weakness.” *In re Embiid*, 2021 USPQ2d 577, at \*33-34 (TTAB 2021) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (citing *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d

1363 , 116 USPQ2d 1129, 1136 (Fed. Cir. 12015) and *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)). Applicant argues that “[t]here is evidence of third-party registrations and uses of marks containing the shared wording ‘ENDUR’ or similar marks for goods in related fields, which is ‘relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.’” 13 TTABVue 13 (quoting *Juice Generation*, 115 USPQ2d at 1674). Applicant’s brief contains the following table of third-party uses and registrations in the record that Applicant claims support its argument:

Table 2: Third-Party Registrations and Uses (Exhibit E)			
Mark and Disclaimer	Reg. No.	Relevant Goods and Documents Showing Uses	Owner
ENDURA 12 Disclaimer: “12”	5754014	Class 22: strapping of textile fibres with device attached for securing articles and other goods in Class 22  See attached website printout: <a href="https://www.teufelberger.com/en/endura-12-rettungs-und-sicherheitsseile.html">https://www.teufelberger.com/en/endura-12-rettungs-und-sicherheitsseile.html</a>	Teufelberger Holding Aktiengesellschaft
ENDURA BRAID Disclaimer: “BRAID”	5754015	Class 22: strapping of textile fibres with device attached for securing articles and other goods in Class 22  See attached website printout: <a href="https://www.teufelberger.com/en/endura-braid-rettungs-und-sicherheitsseile.html">https://www.teufelberger.com/en/endura-braid-rettungs-und-sicherheitsseile.html</a>	Teufelberger Holding Aktiengesellschaft
ENDURALL	4020364	Class 22: Synthetic fibers; Synthetic fibers and filaments for use in the manufacture of fabrics, textiles, yarns, and carpets; Yarn fibers and other goods in Class 25	UNIFI, INC,

*Id.* at 14.<sup>20</sup>

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<sup>20</sup> Two of the citations in the column captioned “Relevant Goods and Documents Showing Uses” are to attachments to Applicant’s brief. The Board strongly discourages the practice of attaching materials to briefs. “Parties to Board cases occasionally seem to be under the

Applicant analogizes this case to the Board's non-precedential decision in *In re Weber State Fed. Credit Union*, Serial No. 88675314 (TTAB Sept. 14, 2021), in which the Board found no likelihood of confusion between ASCENT FEDERAL CREDIT UNION for various credit union services and ASCENT (stylized) for providing lease financing for private student loans.<sup>21</sup> Applicant argues that in that case, the "Board reasoned that 'ASCENT-formative marks are both conceptually and commercially weak and, therefore, are entitled to a narrow scope of protection' based on numerous ASCENT-formative marks registered and used in connection with financial services," 13 TTABVUE 14 (quoting *Weber State Fed. Credit Union*, 18 TTABVUE 23 (Serial No. 88675314)), such that "minute differences between ASCENT-formative marks used in connection with financial services are sufficient to distinguish them." *Id.* at 14-15 (quoting *Weber State Fed. Credit Union*, 18 TTABVUE 25 (Serial No. 88675314)).

Applicant concludes that

[s]imilarly, based on numerous ENDUR-formative marks  
or similar marks registered and used in connection with

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impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or a convenience to the Board. It is neither. When considering a case for final disposition, the entire record is readily available to the panel. Because we must determine whether attachments to briefs are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application, requiring more time and effort than would have been necessary if citations directly to the prosecution history were provided." *In re Michalko*, 110 USPQ2d 1949, 1950-51 (TTAB 2014). We have confirmed that the three registrations, and webpages showing use of two of the registered marks, were made of record by Applicant. February 14, 2022 Request for Reconsideration at TSDR 42-54.

<sup>21</sup> "Non-precedential decisions are not binding on the Board, but may be considered for whatever persuasive value they may hold." *In re Fiat Grp. Mktg. & Corp. Commc'ns, S.P.A.*, 109 USPQ2d 1593, 1596 n.6 (TTAB 2014).



textile fibers, textile filaments and their related goods, ENDUR-formative marks are both conceptually and commercially weak. Specifically, the dictionary definition of the term “endure,” which refers to “continu[ing] to exist in the same state or condition” (**Exhibit D**), supports that ENDUR or ENDURE in connection with textile fibers, textile filaments and their related goods suggests the textile-related goods that are continuing to exist in the same state or conditions for a long time. *See Juice Generation*, 115 USPQ2d at 1675 (third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak”). Thus, the Cited Mark is entitled to a narrow scope of protection which dispels any likelihood of confusion with Applicant’s significantly dissimilar mark, ENDURE.

*Id.* at 15 (emphasis supplied by Applicant).

The Examining Attorney responds that “the very few use-based third-party registrations submitted by applicant are insufficient to establish that the mark or portion of the mark is inherently or conceptually weak,” 15 TTABVUE 14-15, and that the “amount of evidence of third-party use provided by the applicant in this case falls short of the ‘ubiquitous’ or ‘considerable’ use of similar marks found probative in the cases.” *Id.* at 15.

We agree with the Examining Attorney. Applicant has shown no uses or registrations of the marks ENDURE or ENDUR, and has made of record only two registrations and uses of ENDURA-formative marks (owned by the same registrant) and one registration of the mark ENDURALL, without accompanying evidence of use. “This is a far cry from the large quantum of evidence of third-party use and third-party registration that was held to be significant’ in both *Jack Wolfskin* and *Juice*

*Generation.” Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*25-26 (TTAB 2021) (rejecting evidence of “one third-party use and six third-party registrations ‘of varying probative value’”) (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019)).<sup>22</sup>

“We find that the sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion, and we therefore accord [the cited mark] ‘the normal scope of protection to which inherently distinctive marks are entitled.’” *Id.*, at \*26 (quoting *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017)).

## **B. Similarity or Dissimilarity of the Marks**

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.’” *Embiid*, 2021 USPQ2d 577, at \*11 (TTAB 2021) (quoting *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *Inn at St. John’s*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014))).

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<sup>22</sup> “[I]n *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record . . . and in *Jack Wolfskin*, there were at least fourteen . . . .” *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1746 n.8 (TTAB 2016). The paltry evidence of third-party marks here also distinguishes this case from the cited *Weber State Fed. Credit Union* case, in which the Board relied on 15 third-party uses and 12 third-party use-based registrations of ASCENT-formative marks for financial services, 18 TTABVUE 19-22 (Serial No. 88675314), to find that “ASCENT-formative marks are both conceptually and commercially weak and, therefore, are entitled to a narrow scope of protection.” *Id.* at 23 (Serial No. 88675314).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)).

Applicant argues that its mark “and the Cited Mark are not confusingly similar, when the marks are compared in their entireties, with appropriate weight given to all of the terms in the marks.” 13 TTABVUE 11. Applicant claims that this case is similar to both *Knight Textile Corp. v. Jones Inv. Co.*, 75 USPQ2d 1313 (TTAB 2005), in which the Board found no likelihood of confusion between the marks NORTON MCNAUGHTON ESSENTIALS and ESSENTIALS for women’s clothing, and a non-precedential decision, *In re Deutsche Telekom AG*, Serial No. 78492246 (TTAB Mar. 7, 2007), in which the Board found no likelihood of confusion between the marks T-MOBILE NEWS EXPRESS and NEWSEXRESS for various telecommunications services. 13 TTABVUE 11-12.

According to Applicant, “ENDUR-formative marks are highly suggestive and weak for textile-related goods,” *id.* at 12, based on the definition of the word “endure”

as “continuing to exist in the same state or condition,” *id.*,<sup>23</sup> which Applicant argues shows that “ENDUR or ENDURE in connection with textile-related goods suggests the textile-related goods that are continuing to exist in the same state or conditions for a long time.” *Id.*

Applicant further argues that “similar to *Knight Textile Corp.*, numerous third-party ENDUR-formative marks or similar marks registered and used in connection with textile-related goods . . . also support that ENDUR-formative marks are weak in connection with textile-related goods,” *id.*, and that “similar to *In re Deutsche Telekom AG* and *Knight Textile Corp.*, the house mark ‘BY ASCEND’ included in the Cited Mark is the primary and most distinctive element of the Cited Mark, which is sufficient to avoid a likelihood of confusion” between Applicant’s mark and the cited mark, “especially given that the shared wording ‘ENDUR’ or ‘ENDURE’ is highly suggestive and weak for textile-related goods.” *Id.* at 12-13.

Applicant specifically argues that the cited mark “misspells the word endure as ‘ENDUR,’” which “would lead a consumer to think further about the appearance and meaning of the mark; and therefore evokes a different commercial impression than that of the term ENDURE,” *id.* at 13, that the sound of its mark “is substantially different from that of the Cited Mark” because “Applicant’s Mark consists of 2 syllables” while “the Cited Mark consists of 5 syllables,” and that “[t]hese differences in sound also weigh against a finding of a likelihood of confusion.” *Id.*

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<sup>23</sup> February 14, 2022 Request for Reconsideration at TSDR 33-40 (MERRIAM-WEBSTER DICTIONARY).

Applicant concludes that

Considering the effect of the entire mark including any term and design in addition to the word elements, there is no likelihood of confusion between Applicant's Mark and the Cited Mark. Accordingly, consumers are able to distinguish Applicant's Mark and the Cited Mark, based on additional elements, such as the wording "BY ASCEND" and the design element of the stamp with the lines shaped as a slanted Z included in the Cited Mark.

*Id.*

The Examining Attorney responds that "the visual, phonetic and overall commercial impressions derived from the respective marks are substantially similar as to create a likelihood of confusion," 15 TTABVUE 6, and she rejects each of Applicant's arguments. She argues that the dominant portion of the cited mark is the word ENDUR, that this portion is substantially similar to Applicant's mark ENDURE, and that these elements "could clearly be pronounced the same." *Id.* at 8. She further argues that the addition of the house mark "By Ascend" to the word ENDUR in the cited mark does not reduce the similarity of the marks, claiming that Applicant itself and various third parties have registered or applied to register various forms of similar marks for the involved or related goods. *Id.* at 8-9.

The Examining Attorney further argues that "consumers are more likely to remember and believe that the respective textile goods of applicant and registrant are identified under an 'ENDUR/ENDURE' formative mark and assume a singular source origin, rather than retaining a specific impression of one of the marks being spelled with an 'E' versus one without an 'E' and immediately presuming that the source origin differs," *id.* at 11, that the design portion of the cited mark is

subordinate to its literal elements, *id.* at 11-12, and that Applicant's standard-character mark could be displayed "in a manner identical to that of the cited mark." *Id.* at 12.

While the marks must be considered in their entirety, "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." *Sabhnani*, 2021 USPQ2d 1241, at \*30-31 (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). As discussed above, Applicant and the Examining Attorney disagree as to the dominant portion of the cited mark, so we will address that issue before comparing the marks. For ease of reference in following our analysis, we again display the cited mark below:



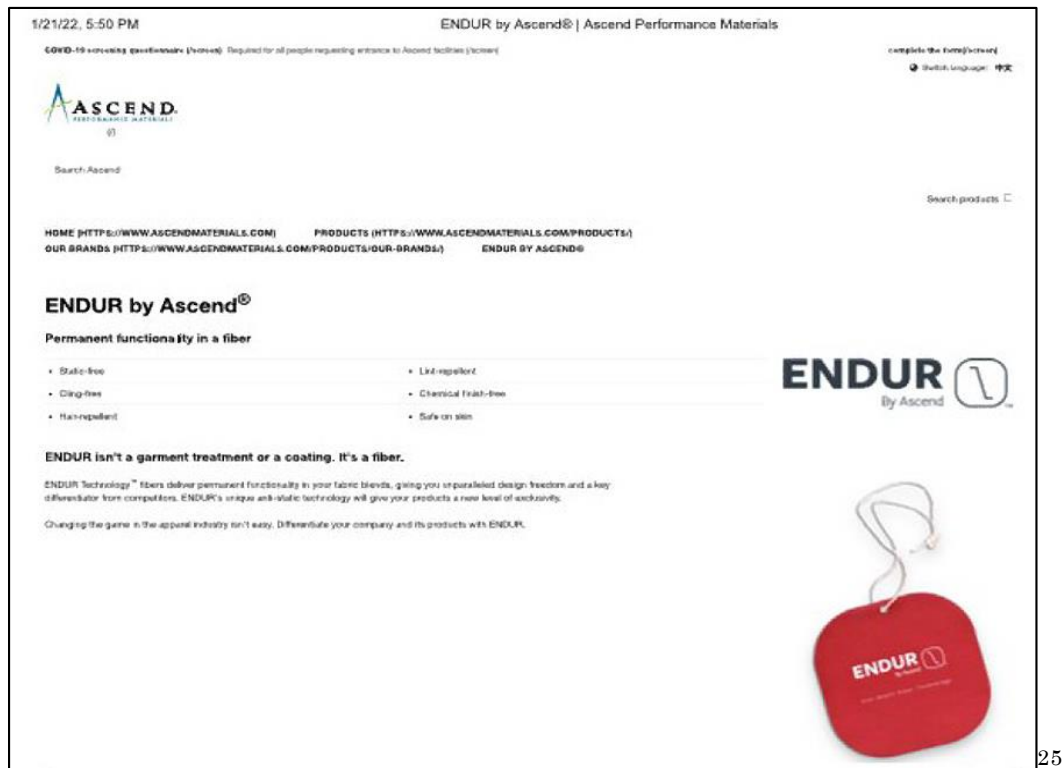
The cited mark is a composite word-and-design mark.<sup>24</sup> "In marks 'consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and

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<sup>24</sup> The registrant describes the mark as "consist[ing] of the stylized wording 'ENDUR BY ASCEND' to the left of a design element comprised of two short horizontal lines connected by a diagonal line within a square." July 31, 2019 Office Action at TSDR 4.

to be used by them to request the goods.” *Id.*, at \*31 (quoting *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)). “The verbal portion of a word and design mark ‘likely will appear alone when used in text and will be spoken when requested by consumers.” *Id.* (quoting *Aquitaine Wine USA*, 126 USPQ2d at 1184).

“We find, in the absence of any evidence to the contrary, that this general principle applies to [the cited] composite mark.” *Id.*, at \*32. The non-descript design element in the cited mark appears to the right of its literal elements, including the word ENDUR, which is the first and largest element of the mark, appearing in bold capital letters. Applicant made of record pages from the registrant’s website, including the one displayed below, in which the cited composite mark is displayed several times, but the registrant refers in text to the goods sold under the composite mark by the use of “ENDUR” alone or “ENDUR by Ascend”:



This textual use of the words in the cited composite mark is probative of the subordinate nature of the design element. *CBS*, 218 USPQ at 200 & n.5 (holding that the principle that words normally dominate designs “is particularly true when a mark appears in textual material, such as catalog descriptions, in which it is often impossible or impractical to include the design features of a mark,” and noting that in the case of the applicant’s composite mark, “approximately 15% of applicant’s total sales are made by mail order, and applicant’s 17-page catalog (of record) displays the words ‘Thinker Toys’ without the light bulb design.”).

<sup>25</sup> February 14, 2022 Request for Reconsideration at TSDR 13. The word ENDUR also appears alone in text on other pages from the registrant’s website that are in the record. *Id.* at TSDR 14-16.



Although the cited mark includes a design element, “we find that the term [ENDUR] is its dominant element. Displayed in a large, bold typeface, it comprises the largest literal portion of the mark in terms of size, position, and emphasis. It is also the first term in the mark, further establishing its prominence.” *Aquitaine Wine USA*, 126 USPQ2d at 1184-85 (citing *Palm Bay Imps.*, 73 USPQ2d at 1692). “[B]ecause of the position, size and bolding of [ENDUR],” *id.* at 1185, and the inferences that we can draw based on the registrant’s textual reference to its goods by the use of ENDUR alone, “this single term dominates the commercial impression of the mark,” *id.*, because it is more prominent than the phrase “By Ascend” that appears below it in smaller, less eye-catching lettering. We turn now to the required comparison of the marks in their entirety, giving greater weight in that comparison to the word ENDUR in the cited mark than to the other elements of the mark.

With respect to appearance, because Applicant’s ENDURE mark is a standard-character mark, we must consider that it “may be presented in any font style, size or color, including the same font, size and color as the literal portions of [the cited] mark,” *id.* at 1186, which would include the large bold capital letters in which word ENDUR is displayed in the cited mark. The marks are more similar than dissimilar in appearance from the standpoint of a consumer whose mind’s eye contains a general rather than specific impression of the cited mark, which is dominated by the word ENDUR in large bold capital letters, and who separately encounters Applicant’s ENDURE mark displayed in the same manner.

As to sound, Applicant acknowledges that “the Cited Mark misspells the word endure as ‘ENDUR’,” 13 TTABVue 13, and thus tacitly admits that Applicant’s mark ENDURE and the word ENDUR, the dominant portion of the cited mark, would sound identical. If the marks are verbalized as “Endur By Ascend” and “Endure,” the identical word “endure” would be the first thing heard.

Applicant’s argument that the marks nevertheless sound “substantially different” because they contain different numbers of syllables, *id.*, is unavailing for two reasons. First, the Board has long recognized that consumers do not process this sort of minutia when forming impressions of marks in their “mind’s ear.” See *In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”). Just as marks are not viewed together when comparing them in appearance, they are not pronounced sequentially when comparing them for aural similarity or dissimilarity, and the marks are more similar than dissimilar in sound from the standpoint of a consumer whose “mind’s ear” contains a general rather than a specific impression of the sound of the cited mark, which begins with, and is dominated by, the word ENDUR, and who then separately hears Applicant’s ENDURE mark verbalized.

Second, Applicant’s argument assumes that the cited mark will be verbalized as “Endur by Ascend,” and does not take into account “the penchant of consumers to shorten marks.” *Sabhnani*, 2021 USPQ2d 1241, at \*36 (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016)). If this penchant is engaged in

by consumers with respect to the cited mark, it would be verbalized as “Endur” alone. The words “By Ascend” in the cited mark have source-identifying significance, unlike the word “BRANDS” in the mark MIRAGE BRANDS in *Sabhnani* and the word “BLONDE” in the mark TIME TRAVELLER BLOND in *Bay State Brewing*, but it is still likely that many consumers would shorten “ENDUR By Ascend” to “ENDUR” because “the users of language have a universal habit of shortening full names—from haste or laziness or just economy of words.” *Bay State Brewing*, 117 USPQ2d at 1961 (quoting *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring)). Indulging in this “universal habit” with respect to the cited mark would cause it to sound identical to Applicant’s mark.

Finally, with respect to connotation and commercial impression, we find unpersuasive Applicant’s argument that the misspelling of “endure” as “endur” in the cited mark would “evoke[] a different commercial impression than that of the term ENDURE.” 13 TTABVUE 13. Applicant argues on the preceding page in its brief that the dictionary definition of “endure” as “continuing to exist in the same state or condition” “supports that ENDUR **or** ENDURE in connection with textile-related goods suggests the textile-related goods that are continuing to exist in the same state or conditions for a long time.” *Id.* at 12 (emphasis added). Having argued that the words ENDURE and ENDUR have the same meaning, Applicant cannot also argue that they evoke different commercial impressions in the respective marks.

As noted above, notwithstanding the similarity of the marks in meaning, Applicant argues that “ENDUR-formative marks are highly suggestive and weak for

textile related goods,” *id.*, citing both the dictionary definition of “endure” and the existence of “numerous third-party ENDUR-formative marks or similar marks registered and used in connection with textile-related goods . . .” *Id.* Applicant’s evidence of a few third-party uses and registrations of “ENDUR-formative marks” is no more persuasive to show that the involved marks are “highly suggestive and weak” than it is to show that the cited mark is entitled to only a narrow scope of protection,<sup>26</sup> but to the extent that ENDUR suggests a quality of the goods, it is the dominant portion of the cited mark for the reasons discussed above.

As discussed above, we must take into account the general impression of the cited mark held by a consumer in considering whether it is similar to Applicant’s mark in all means of comparison. We have found that the cited composite mark is dominated by the word ENDUR, which precedes the “house mark” “By Ascend.” A consumer who separately encounters Applicant’s ENDURE mark could readily view it as a shortened version of the literal portion of the cited mark, “ENDUR By Ascend,” “with both marks indicating a single source for the goods,” *Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1661 (TTAB 2014), particularly because the house mark “By Ascend” in the cited mark follows, rather than precedes, the dominant portion

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<sup>26</sup> The very small number of third-party marks here distinguishes this case from the *Knight Textile* case cited by Applicant in support of its argument that the presence of the words “By Ascend” in the cited mark makes the mark dissimilar to Applicant’s ENDURE mark. In *Knight Textile*, the Board found that the applicant’s claim that the term ESSENTIALS was highly suggestive of clothing was corroborated by its evidence of 23 third-party registrations (owned by 21 different owners) of marks containing the word ESSENTIALS. *Knight Textile*, 75 USPQ2d at 1316.

ENDUR, and appears in smaller letters,<sup>27</sup> and because the registrant itself engages in such “shortening” to identify the goods on its website. *See also In re Mighty Leaf Tea*, 601 F.2d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (noting that “the presence of an additional term in [the cited] mark does not necessarily eliminate the likelihood of confusion if some terms are identical” and noting that the Board had found that the applicant’s mark ML for personal care and skin care products was likely to be viewed as a shortened version of the cited mark ML (stylized) MARK LEES). We find that the marks are quite similar in connotation and commercial impression.

The marks are more similar than dissimilar in appearance, and quite similar in sound and meaning. The first *DuPont* factor supports a finding of a likelihood of confusion.

### **C. Similarity or Dissimilarity of the Goods**

The second *DuPont* factor “‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration’ . . . .” *Embiid*,

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<sup>27</sup> The fact that the “house mark” in the cited mark here follows ENDUR distinguishes this case from the *Deutsche Telekom* case cited by Applicant, in which the Board found that T-MOBILE NEWS EXPRESS and NEWSEXRESS were not confusingly similar. The Board found that the applicant’s mark began “with the term T-Mobile, which would be perceived to be applicant’s house mark,” 9 TTABVue 8 (Serial No. 78492246), and that “although the word NEWSEXRESS is the entirety of the commercial impression created by registrant’s mark, in applicant’s mark, the words ‘news express’ contribute less to the composite mark’s commercial impression than does the house mark T-Mobile” because “significantly, for our analysis, this term is the first portion of applicant’s composite mark.” *Id.* at 8-9. The position of the house mark in the cited mark further distinguishes this case from *Knight Textile*, in which the Board found that the marks NORTON MCNAUGHTON ESSENTIALS and ESSENTIALS were “dissimilar in terms of sight, sound and meaning to the extent that applicant’s mark, but not opposer’s, includes and begins with the words NORTON MCNAUGHTON, which would be perceived to be applicant’s house mark.” *Knight Textile*, 75 USPQ2d at 1315.

2021 USPQ2d 577, at \*29 (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1051). The goods identified in the cited registration are “textile fibers; textile filaments,” while the goods identified in the application are “fabrics for textile use, namely, heat, flame and fire resistant fabrics for bedding; non-woven textile fabrics, namely, heat, flame and fire resistant non-woven textile fabrics for bedding; woven fabrics, namely, heat, flame and fire resistant woven fabrics for bedding; knitted fabrics, namely, heat, flame and fire resistant knitted fabrics for bedding.”

“The goods need not be identical, but ‘need only be related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.’” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration.

*Id.*, at \*22-23 (quoting *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*5 (TTAB 2020)).

“The Examining Attorney need not prove, and we need not find, similarity as to each product listed in [Applicant’s] description of goods. ‘It is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.’” *In re St. Julian*

*Wine Co.*, 2020 USPQ2d 10595, at \*3-4 (TTAB 2020) (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015)).

Applicant argues that the “Cited Mark covers the goods ‘textile fibers; textile filaments,’ in Class 22” and that “[w]hile the Cited Mark’s description of goods is written broadly and is presumed to have no limitations, it is appropriate to take into consideration the actual nature of the goods covered by the Cited Mark to determine whether or not there is a likelihood of confusion between Applicant’s Mark and the Cited Mark.” 13 TTABVUE 7. Applicant further argues that “[b]ased on the actual nature of the goods covered by the Cited Mark and the nature of the goods of Applicant’s Mark . . . the goods are completely different and have different uses, purposes, and functions.” *Id.* According to Applicant, “the goods covered by the Cited Mark are textile fibers and filaments, which are not end products themselves, but are spun into yarn or made into fabrics” for use “in the manufacture of clothing and uniforms, evening wear, shapewear and childrenswear, as shown in the owner of the Cited Mark’s website,” *id.*, while “Applicant’s Goods are heat, flame and fire resistant fabrics specifically for bedding, as identified in Applicant’s Goods. More particularly, Applicant’s Goods are used as flame retardant (FR) filler cloth fabric for the manufacture of mattresses,” as shown by Applicant’s website. *Id.*

Applicant argues that “when considering the actual nature of the goods covered by the Cited Mark and the nature of Applicant’s Goods, the respective goods are completely different from one another and have different uses, purposes, and functions.” *Id.*

Applicant further argues that

[t]he Examining Attorney referenced third-party internet evidence and alleged that Applicant's Goods and the Cited Goods are sufficiently related for likelihood of confusion purposes, because there are third-parties that provide both Applicant's Goods and the Cited Goods. As discussed more fully below, Applicant's Goods are not identical, competitive, complementary, or sufficiently related to the Cited Goods to result in a likelihood of confusion. This undercuts the basis for the refusal under Section 2(d) for the following reasons.

*Id.* at 8.

Applicant points to “third-party registrations for the same or similar marks, owned by different entities, and covering comparable goods in Class 24 on the one hand and the Cited Goods and their related goods in Class 22 on the other,” which “evidence assists in countering the evidence supplied by the Examining Attorney” and “demonstrates that, in fact, the USPTO has repeatedly considered the goods to be not closely enough related to create a likelihood of confusion, even when the peacefully coexisting third party marks share the only distinctive term in the marks.”

*Id.* Applicant's brief contains the following table of “pairs” of third-party registrations of the same mark for goods in Classes 22 and 24:



Table 1: Third-Party Registrations (Exhibit C)

Mark	Class 24 Fabrics for textile use; non-woven textile fabrics; woven fabrics; knitted fabrics and Related Goods	Mark	Class 22 Textile fibers; textile filaments and Related Goods
<b>DAPHNE</b> Reg: 5790266 Serial: 79234567	<b>024</b> towels of textile	<b>DAPHNE</b> Reg: 6497475 Serial: 90258830	<b>022</b> textile fibers
<b>GRACELL</b> Reg: 6035570 Serial: 88583997	<b>024</b> bed covers	<b>GRACELL</b> Reg: 6018619 Serial: 88598409	<b>022</b> textile fibers
<b>#BEYOU</b> Reg: 4871157 Serial: 86064683	<b>024</b> bed linens	<b>BE·YOU</b> Reg: 5250228 Serial: 87258166	<b>022</b> raw textile fibers

*Id.* at 9.<sup>28</sup>

Applicant concludes that

Based on these peacefully co-existing third-party registrations that cover goods comparable to Applicant's Goods and their related goods in Class 24 on the one hand and the Cited Goods and their related goods in Class 22 on the other, the conclusion can be drawn that Applicant's Goods and the Cited Goods are sufficiently unrelated to avoid a likelihood of confusion.

...

Put another way, these third-party registrations suggest that consumers are aware that the goods are provided by different companies even under the same or similar marks. Thus, there is no evidence of record showing that Applicant's Goods and the Cited Goods are related in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source. . . . This lack of

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<sup>28</sup> These third-party registrations were made of record by Applicant. February 14, 2022 Request for Reconsideration at TSDR 18-32.

direct relatedness weighs against a finding of likely confusion.

*Id.* (citation omitted).

In response to Applicant's arguments, the Examining Attorney "submits that while applicant has limited its fabrics goods to heat, flame and fire resistant fabrics for bedding, the registrant has not explicitly limited its textile fibers and textile filaments to any particular field, usage or purpose," 15 TTABVUE 20, that "determining likelihood of confusion is based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use," *id.*, and that the "registrant's identification of goods could encompass flame resistant *textile fibers, textile filaments* for bedding, *textile fibers* for use in making flame resistant fabrics for bedding, and the like." *Id.* (emphasis supplied by the Examining Attorney).

The Examining Attorney argues "that it is well-established that the same entity commonly manufactures, produces, or provides the respective relevant goods, i.e., fibers and fabrics for use in a variety of industries and for a variety of applications, and markets the goods under the same mark or substantially similar formative marks," *id.* at 21, citing Internet webpages and third-party registrations. *Id.* She concludes that "the cumulative evidentiary record establishes that the same entity manufactures and/or produces the relevant goods of applicant and registrant," and that "Applicant itself not only provides heat, flame and fire resistant fabrics for bedding but also provides textile fibers under the same house mark as evidenced on applicant's website." *Id.* at 22.

The Examining Attorney further argues that “a likelihood of confusion can also be found where the relevant goods are similar or complementary in terms of purpose or function,” and “[f]abrics and fibers are often grouped together under the umbrella of the textile industry and, in addition to often emanating from a singular source, are complementary in terms of purpose and/or function for making user-end finished products,” *id.*, citing evidence from three websites that she claims shows “such complementary purpose and/or functionality related to the respective goods,” *id.*, and “representative examples of such related and complementary uses emanating from a singular source.” *Id.* at 23.

With respect to Applicant’s pairs of third-party registrations, the Examining Attorney argues that Applicant

has submitted six (6) third-party registrations showing such usage by various third parties to support the argument that consumers would not believe that its goods and registrant’s good emanate from a singular source under the respective marks. These registrations appear to be for goods and/or services that are predominantly different from or unrelated to those identified in the cited registration and applicant’s application. In other words, although registrant’s goods are shown in three (3) of the submitted third party registrations, the International Class 024 goods in the submitted third party registrations are for finished products, such as towels of textile, bed covers and bed linens, and not for the fabrics used to make such goods, and the goods for which applicant identifies in its application.

*Id.* at 23-24.

We begin with Applicant’s reliance on its and the registrant’s actual use of the involved marks. Under the second *DuPont* factor, “[w]e must look to the goods as identified in the involved applications and cited registration, not to any extrinsic

evidence of actual use.” *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (citing *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014)). Applicant argues that we should look to extrinsic evidence because the “terminology in [the] identification [in the cited registration] is unclear or undefined.” 13 TTABVUE 7 (quoting TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMEP”) § 1207.01(a)(iii) (“In cases where the terminology in an identification is unclear or undefined, the Trademark Trial and Appeal Board has permitted an applicant to provide extrinsic evidence to show that the registrant’s identification has a specific meaning to members of the trade.”)). This TMEP subsection cites the Board’s decisions in *In re Thor Tech, Inc.*, 90 USPQ2d 1638 (TTAB 2009) and in *In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB 1990), in which the Board held that extrinsic evidence may be considered in construing a term in an identification of goods in a cited registration if the term is “somewhat unclear” or “somewhat vague.” *Trackmobile*, 15 USPQ2d at 1154 (considering extrinsic evidence to construe the term “light railway motor tractors”).

To the extent that the term “textile fibers” in the cited registration is “somewhat unclear” or “somewhat vague,” *id.*, we may look to extrinsic evidence in the record, not to narrow the scope of the term, but rather to better understand it.<sup>29</sup> *See In re*

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<sup>29</sup> The “Board may take judicial notice of dictionary definitions, including online dictionaries, definitions in technical dictionaries and translation dictionaries that exist in printed form.” *In re Zuma Array Ltd.*, 2022 USPQ2d 736, at \*12 (TTAB 2022) (quotation omitted). “Textile” is an adjective in the phrase “textile fibers” in the identification of goods in the cited registration, and we take judicial notice that “textile” in its adjective form means “woven or capable of being woven,” DICTIONARY.COM (last accessed on December 15, 2022), and may refer to material “that has been or can be woven.” COLLINS ENGLISH DICTIONARY (collinsdictionary.com, last accessed on December 15, 2022).

*Thor Tech, Inc.*, 113 USPQ2d 1546, 1547 (TTAB 2015) (looking to Woodall’s RV Buyer’s Guide to interpret the term “towable trailers” in the phrase “recreational vehicles, namely, towable trailers” in the identification of goods in the application). In doing so, “we evaluate the usages encompassed by a registration’s statement of goods and cannot countenance an applicant’s attempt to show that a registrant’s actual usage is narrower than the statement of goods in the registration.” *Id.* at 1548 n.8.

The Examining Attorney made of record pages from the website at makersvalley.com discussing the difference between a “fabric,” the type of goods identified in Applicant’s application, and a “fiber.”<sup>30</sup> According to this website, “[f]ibers, yarns, fabric composition, and finishes are elements that contribute to the beauty, durability, care and comfort of textile products,”<sup>31</sup> and “[a]ny substance, natural or manufactured, with a high-length-to-width ratio and suitable characteristics for being processed into fabrics is a fiber.”<sup>32</sup> “In other words, a fiber is a long and thin strand or thread of material that can be knit or woven into a fabric.”<sup>33</sup> The article notes that “[t]here are two types of fabric fibers: natural fibers and synthetic fabric fibers.”<sup>34</sup>

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<sup>30</sup> April 15, 2022 Denial of Request for Reconsideration at TSDR 105.

<sup>31</sup> *Id.* at TSDR 107.

<sup>32</sup> *Id.* at TSDR 108.

<sup>33</sup> *Id.* at TSDR 108-09.

<sup>34</sup> *Id.* at TSDR 109.

The pages from the cited registrant's website made of record by Applicant state that "ENDUR isn't a garment treatment or a coating. It's a fiber."<sup>35</sup> The website displays various goods that may be made from fibers, including yoga and performance gear, loungewear, medical uniforms, eveningwear, shapewear, and children's wear.<sup>36</sup> Applicant seizes on these examples to try to limit the identification of goods to textile fibers used to make these particular goods, 13 TTABVUE 7, but unlike the term "fabrics for textile use" in the goods identification in the application, the term "textile fibers" in the goods identification in the cited registration is not limited to any particular field of use. In the absence of any such limitation, we must construe "textile fibers" to include fibers for use in any sort of product made from "textile fibers." *See, e.g., In re FSA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018) ("where an application contains no such restrictions, examining attorneys and the Board must read the application to cover all goods of the type identified, to be marketed through all normal trade channels, and to be offered to all normal customers therefor") (citing *Stone Lion*, 110 USPQ2d at 1162-63)).

Applicant's website shows that its "Fabrics for textile use, namely, heat, flame and fire resistant fabrics for bedding; non-woven textile fabrics, namely, heat, flame and fire resistant non-woven textile fabrics for bedding; woven fabrics, namely, heat, flame and fire resistant woven fabrics for bedding; knitted fabrics, namely, heat,

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<sup>35</sup> February 14, 2022 Request for Reconsideration at TSDR 13.

<sup>36</sup> *Id.* at TSDR 14-17.

flame and fire resistant knitted fabrics for bedding” are made from fibers.<sup>37</sup> The Examining Attorney made of record pages from the website of furnituretoday.com discussing Applicant’s “fiber products,” which state that the products “can be used in the top comfort layer of mattresses, as well as an alternative to firmer foams that support spring units.”<sup>38</sup>

The Examining Attorney made of record two third-party examples showing the use of textile fibers in bedding. Kaneka offers a Protex® flame-retardant fiber for such use:



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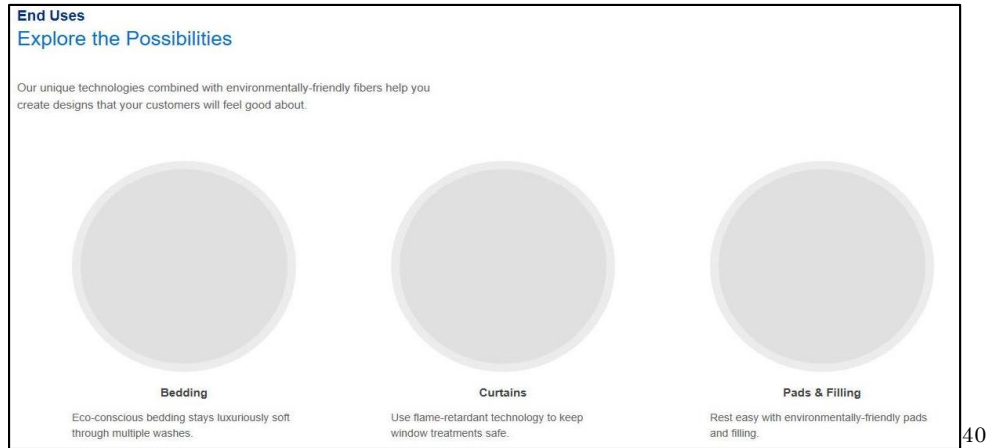
while Unifi offers its Reprieve fibers for such use:

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<sup>37</sup> April 15, 2022 Denial of Request for Reconsideration at TSDR 6 (stating that Applicant’s Ecoflex fabric is “[m]ade from 100% eco[-]friendly FR cellulosic fiber”), 7 (stating that in Applicant’s Ecoloft fabric, “FR fibers are expertly blended with polyester for added loftiness” and that Applicant’s Purloft fabric contains wool fibers, which are biodegradable, renewable and sustainable, and which help products retain shape for longer and create air pockets, which act as a natural insulator to help regulate body temperature).

<sup>38</sup> *Id.* at TSDR 125.

<sup>39</sup> *Id.* at TSDR 48.



The fact that the “textile fibers” identified in the cited registration may be used to create the “fabrics for textile use” for bedding identified in Applicant’s application shows that the involved goods are somewhat intrinsically related.

The Examining Attorney also provided evidence that the involved goods are related because they are sold by the same company under the same mark. She made of record a page from Applicant’s website at [precisiontextiles-usa.com](http://precisiontextiles-usa.com) stating that Applicant itself supplies both “coated fabrics” and “specialty fibers” as part of its “technology-driven product line,”<sup>41</sup> and multiple third-party webpages showing that companies supply both fibers or fiber products, and fabrics for textile use.<sup>42</sup>

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<sup>40</sup> *Id.* at TSDR 68. Unifi is the owner of one of the marks listed in Applicant’s table of third-party uses and registrations of marks for similar goods.

<sup>41</sup> *Id.* at TSDR 2.

<sup>42</sup> July 31, 2019 Office Action at TSDR 9-10 (Schott Textiles), 14, 22-23 (EnviroTextiles), 39 (Ennis Fabrics), 75-76 (Toray); September 10, 2021 Final Office Action at TSDR 12-13, 26-29 (Flock Tex); April 15, 2022 Denial of Request for Reconsideration at TSDR 73, 76-80 (BallyRibbon Mills), 82-84, 89-90 (Trelleborg).



The Examining Attorney also made of record 11 third-party used-based registrations of marks covering both “textile fibers” and “fabrics for textile use.”<sup>43</sup> “As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have some probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a single source.” *I-Coat Co.*, 126 USPQ2d at 1738 (citations omitted).

None of the third-party registrations covers the specific “fabrics for textile use, namely, heat, flame and fire resistant fabrics for bedding” identified in the application, but that does not detract from their probative value. “Just as we must consider the full scope of the goods and services as set forth in the application and registration under consideration, we must consider the full scope of the goods and services described in a third-party registration.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*9 (TTAB 2019). A third-party “registration that describes goods broadly is presumed to encompass all goods or services of the type described,” *id.* (citing *Stone Lion*, 110 USPQ2d at 1161), and in giving the term “fabrics for textile use” in the third-party registrations its full scope, we must presume that it encompasses all such fabrics, including “heat, flame and fire resistant fabrics for bedding.” We note in that regard that Applicant’s application originally covered goods

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<sup>43</sup> July 31, 2019 Office Action at TSDR 79-82 (Registration No. 4274489), 83-86 (Registration No. 4890034), 87-89 (Registration No. 4918970), 90-92 (Registration No. 4855603), 109-11 (Registration No. 5803037); September 10, 2021 Final Office Action at TSDR 43-46 (Registration No. 4274485), 47-49 (Registration No. 6130503), 50-51 (Registration No. 6301752), 52-54 (Registration No. 6091636), 55-57 (Registration No. 6342086), 58-62 (Registration No. 6394865).

broadly identified simply as “Fabrics for textile use,” and the term “fabrics for textile use” in the third-party registrations encompasses the narrower subset of such fabrics ultimately identified in the application. The third-party registrations “are sufficient in both quality and quantity to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of its own.” *Id.*, at \*10 (citing *In re Pacer Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)).

The Board has held that to try to rebut such evidence of relatedness, “applicants may submit sets of third-party registrations to suggest the opposite, i.e., that the Office has registered the same mark to different parties for the goods at issue, suggesting that the goods are not related.” *Embiid*, 2021 USPQ2d 577, at \*37 (quoting *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1369-70 (TTAB 2009)). *See also Thor Tech*, 113 USPQ2d at 1547-49 (inferring from the “existence of almost fifty pairs of substantially identical marks for land motor vehicles and for towable recreational vehicle trailers on the federal Trademark Register” that “businesses in these two industries believe that their respective goods are distinct enough that confusion between even identical marks is unlikely” and finding that the third-party registrations “rebut[ted] the relevant, two third-party registrations made of record by the Trademark Examining Attorney,” leading the Board to find that “the similarity of the goods factor weighs against likelihood of confusion.”).

The three pairs of registrations submitted by Applicant here are insufficient in quality and quantity to rebut the Examining Attorney’s showing of relatedness. All

three pairs include one registration that covers the Class 22 goods identified in the cited registration as “textile fibers,” but none of the paired registrations covers “fabrics” because each covers a finished good (“towels of textile,” “bed covers,” and “bed linens,” respectively). For this reason alone, the pairs are entitled to much less weight than the Examining Attorney’s third-party registrations. *G.B.I. Tile & Stone*, 92 USPQ2d at 1370 (the applicant’s evidence “consist[ing] of [13 pairs of] registrations that list one of applicant’s goods but do not include any goods that are in the cited registration, or registrations that list one of the goods in the cited registration but do not include any of applicant’s identified goods” was given much less weight).

Moreover, to the extent that Applicant’s three registrations have any probative value, they are too few in number to overcome the Examining Attorney’s 11 registrations showing that the involved goods are related. *Cf. Embiid*, 2021 USPQ2d 577, at \*37 n.55 (suggesting that four third-party registrations would be insufficient to overcome the examining attorney’s relatedness evidence consisting of pages from three websites and more than 20 third-party registrations); *Thor Tech*, 113 USPQ2d at 1549 (the applicant’s evidence of dozens of relevant third-party registrations outweighed the examining attorney’s evidence of two relevant third-party registrations). *See also In re Pierce-Arrow Soc’y v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, at \*13 (TTAB 2019) (two relevant pairs of third-party registrations “are too few in number to override the clear and explicit relationship exhibited in the application and registration.”). “The fact that [A]pplicant was able to

find and submit for the record these registrations of marks for individual items does not rebut the [E]xamining [A]ttorney's evidence showing the existence of numerous third-party registrations using the same marks on a variety of items, including applicant's and registrant's goods." *G.B.I. Tile & Stone*, 92 USPQ2d at 1370.

"Here, the totality of the Internet and third-party registration evidence demonstrates that consumers would readily expect that these goods emanate from the same sources." *I-Coat Co.*, 126 USPQ2d at 1739. We find that the second *DuPont* factor supports a finding of a likelihood of confusion.

#### **D. Similarity or Dissimilarity of the Channels of Trade**

"[T]he third *DuPont* factor considers 'the similarity or dissimilarity of established, likely-to-continue trade channels.'" *Embiid*, 2021 USPQ2d 577, at \*22 (quoting *DuPont*, 177 USPQ at 567). Applicant argues that the "Cited Goods are sold though completely different channels of trade," and that "[b]ecause of their different uses, Applicant's Goods and the Cited Goods are used in different markets, and as such, they are unlikely to be marketed to the same types of consumers." 13 TTABVUE 7. Applicant bases these arguments on the actual fields of use for the goods of the cited registrant, which, as discussed above, cannot be used by Applicant to limit the scope of the goods identified in the cited registration in the absence of corresponding limitations in the identification. *Embiid*, 2021 USPQ2d 577, at \*28.

The Internet evidence discussed above showing the sale of both textile fibers and fabrics for textile use by the same entity establishes that both sets of goods are marketed through the websites of fabric companies and, by inference, through any

corresponding brick-and-mortar world outlets. Those channels of trade would expose the sellers' use of the marks for both sets of goods to purchasers of either. Accordingly, we find that the channels of trade for the goods at least overlap, and that the third *DuPont* factor supports a finding of a likelihood of confusion.

#### **E. Purchasing Conditions and Sophistication of Purchasers**

The fourth *DuPont* factor “considers ‘[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse vs. careful, sophisticated purchasing.’” *Embiid*, 2021 USPQ2d 577, at \*31 (quoting *DuPont*, 177 USPQ at 567). “Purchaser sophistication may tend to minimize the likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect.” *Sabhnani*, 2021 USPQ2d 1241, at \*39-40 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1695).

Applicant argues that

Applicant's Goods and the Cited Goods are, by their nature, not in the category of goods purchased on impulse. Specifically, Applicant's Goods are marketed and sold to industry professionals, such as manufacturers, textile engineers, technicians, and purchase agents and contractors, who are explicitly looking for heat, flame and fire resistant fabrics specifically for bedding as identified in Applicant's Goods. Such individuals would exhibit extraordinary care when purchasing Applicant's Goods under Applicant's Mark and would not be confused with the Cited Mark.

Similarly, the Cited Goods are not goods used by ordinary consumers, but by industry professionals, such as manufacturers, textile engineers, and their associated purchase agents and contractors, who are explicitly looking for fibers specifically for clothing, including yoga and performance gear, loungewear, medical clothing and uniforms, eveningwear, shapewear and childrenswear. They, too, would exhibit care when purchasing the Cited

Goods under the Cited Mark and would not be confused by Applicant's Mark.

Moreover, Applicant's Goods and the Cited Goods are not off-the-shelf products, but are industrial products that are purchased by tons. Because of this, Applicant's Goods and the Cited Goods are not the sort of products bought on impulse.

Any customers and/or prospective customers looking to purchase Applicant's Goods and the Cited Goods would most likely exercise a heightened level of care in deciding the ultimate source from which to obtain the respective goods they seek. Thus, the identity of the customers and the conditions of purchase weigh against a finding of likely confusion.

13 TTABVUE 10.

The Examining Attorney does not dispute that the purchasers of the involved goods are professional buyers. She argues simply that "the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion," 15 TTABVUE 24, and that "where the purchasers consist of both professionals and the public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser." *Id.* at 24-25. She concludes that

even if sophisticated industry professionals are aware of the differences in the actual goods identified by applicant and registrant, this does not necessarily mean that they would assume a separate source origin for the respective goods, particularly in light of the cumulative evidentiary record establishing that these types of goods commonly emanate from a singular source, including applicant, and serve a related and complementary purpose and/or function.

*Id.* at 25.

Although Applicant did not submit a declaration discussing the nature of the purchasers and purchase process for the involved goods, the Internet webpages and articles in the record suggest that the purchasers of the involved goods are likely to consist primarily if not exclusively of professional buyers who will exercise something more than ordinary care in making purchases. This *DuPont* factor supports a finding of no likelihood of confusion.

#### F. Applicant's "Consistency" Arguments

Applicant argues that the refusal to register should be reversed because "it would be inconsistent for the USPTO to refuse registration of Applicant's Mark based on the Cited Mark, after the USPTO registered the Cited Mark despite the previous registration of the above-referenced registration for ENDURALL," 13 TTABVUE 15, which is listed in Applicant's table of third-party registrations and uses of similar marks shown and discussed above. Applicant states that it "understands that each application is decided on its own merits," but argues that "the USPTO also strives for consistency of examination." *Id.* Applicant cites the USPTO's Consistency Initiative, which is discussed on the USPTO's website.<sup>44</sup>

Applicant's reliance on the Consistency Initiative is misplaced. Under that initiative,

An applicant may bring to the attention of the Office situations where, in applicant's opinion, **the Office has acted inconsistently in its treatment of applicant's pending applications/recent registration(s).** For Requests that address substantive or procedural issues

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<sup>44</sup> Information regarding the Consistency Initiative may be viewed at [uspto.gov/trademark-updates-and-announcements/consistency-initiative](https://uspto.gov/trademark-updates-and-announcements/consistency-initiative).

(excluding issues involving identifications of goods and services), applicants' Requests may include registrations that have issued within five years. **Applicants may submit a Request when a substantive or procedural issue has been addressed in a significantly different manner in different cases, subject to the following provisions: (1) the Request is based on co-pending applications or an application and a registration owned by the same legal entity or a successor in interest (e.g., assignee); (2) the registration(s) involved was issued less than five years prior to the date of the Request; (3) at least one of the applications in the Request is in a pre-publication status at the time of the Request; and (4) the allegedly inconsistent treatment has already occurred. Third parties are prohibited from submitting Requests in this forum, and the Office will not consider or act on such Requests.**

uspto.gov/trademark-updates-and-announcements/consistency-initiative (emphasis added).

Applicant's complaint here is that the USPTO should allow registration of its mark not because because the USPTO previously allowed registration of another of its marks, but because the USPTO previously allowed registration of a similar mark owned by an unaffiliated registrant. The Consistency Initiative does not apply in that situation.

Consistency in examination generally is, of course, "highly desirable [but] consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with the decisions of prior examining attorneys must yield to proper determinations under the Trademark Act and rules." *Embiid*, 2021 USPQ2d 577, at \*44 (quoting *In re Ala. Tourism Dep't*, 2020 USPQ2d 10485, at \*11 (TTAB 2020) (quoting *In re Am. Furniture Warehouse Co.*, 126 USPQ2d 1400, 1407 (TTAB 2018)). "We do not believe that our decision here is inconsistent with the registration



of the third-party mark[ ] cited by Applicant, but to the extent that it is, it is the decision required under the statute on the record before us.” *Ala. Tourism Dep’t*, 2020 USPQ2d 10485, at \*11.

#### **G. Weighing the *DuPont* Factors**

The key first and second *DuPont* factors support a finding of a likelihood of confusion, as the marks are quite similar and the goods are related and are often provided by the same entity under the same mark. Given the similarity of the marks and the fact that the involved goods are often sold by the same entity, consumers could readily conclude that the registrant has extended its fiber line into specialty fabrics for textile use in bedding. The third *DuPont* factor also supports a finding of a likelihood of confusion because the channels of trade for the involved goods overlap, and in those channels the marks and goods may be exposed to the same classes of consumers.

The fourth *DuPont* factor cuts the other way, as the record shows that the involved goods are purchased by professional buyers who are likely to exercise more than ordinary care in their purchase decisions. Purchaser sophistication, however, “does not always result in a finding that confusion is unlikely.” *In re Info. Builders, Inc.*, 2020 USPQ2d 10444, at \*4 (TTAB 2020) (citing *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841-42 (Fed. Cir. 1990)). On the basis of the record as a whole, we find that the first, second, and third *DuPont* factors outweigh the fourth factor, and that professional buyers who are exposed to the textile fibers sold under the cited composite mark, which is dominated by the word ENDUR, who

are exposed to Applicant's ENDURE mark for related specialty textile fabrics, are likely to believe mistakenly that the source of those textile goods is the same.

**Decision:** The refusal to register is affirmed.